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No. 01-358

Supreme Court, U.S.
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In The

Supreme Court of The United States

CONEY ISLAND RESORTS, INC.,

Petitioner,

- against -

RUDOLPH GIULIANI, individually and as Mayor of the City of New York and THE CITY OF NEW YORK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY TO BRIEF IN OPPOSITION

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I. Respondents' Brief in Opposition, Bereft of Documentary Support for its Principal Contentions of Fact, Starkly Illuminates the Enormity of the Material Factual Disputes Precluding a Summary Judgment Award

A. Contradicting its Own Letters and Affidavits, the City Disingenuously Argues That the Ground Lease Executed by CIR Was Materially Incomplete

The City's Brief in Opposition (at 3-5, 15) argues that the District Court and Court of Appeals decisions were correct because the Ground Lease referenced in the extension agreements was materially incomplete, lacked approval as to form by the City's Corporation Counsel, was labeled a "draft", and was intended solely to be exhibited to prospective lenders rather than put to actual use.

No Appendix reference is given to support the claim of material incompleteness or lack of Corporation Counsel approval. The sole "support" for the contention that the Ground Lease was prepared for "show" purposes only, is a cite to Appendix page 62a, an excerpt from an affidavit in opposition given in the District Court years after the fact, by a City official, which consists simply of undocumented opinion and, insofar as it states that "the parties negotiated the material terms of a ground lease, which were embodied into a draft Consolidated and Restated Lease dated November 15, 1990" (*Id.* at ¶ 12), flatly contradicts the City's claim that the Ground Lease executed by CIR was materially incomplete.

The City's contentions concerning the purported insufficiency of the Ground Lease are fully addressed in footnote 3 to CIR's Petition for Writ of Certiorari (at 5-6).

Quoted in that footnote are two letter agreements between CIR and the City (the first and second extension agreements), both approved as to form by Corporation Counsel, expressly confirming that the Ground Lease had been concluded in "material respects". Also quoted in that footnote are two affidavits from City officials, one presented in 1994 and the other presented in the District Court, also confirming that the ground lease had been concluded "in all material respects" and contained the "material terms".

Thus, the City's factual contentions concerning the sufficiency of the Ground Lease signed by CIR, contentions vigorously contested by CIR, are undocumented and, in fact, are contrary to the documentary evidence.

Indeed, neither the District Court nor the Court of Appeals accepted the City's aforementioned argument, both courts below implicitly finding that a valid contract to enter a lease existed, a contract that referenced a sufficiently definite lease form. Those courts held that the contract failed not because of indefiniteness, but rather, by reason of a purported failure of an implied-in-fact financing condition precedent to lease execution.

B. Contradicting the Express Ground Lease Terms, the City Disingenuously Contends That Execution of the Ground Lease Was at All Times Contingent Upon Pre-Lease Execution Financing

The City's Brief in Opposition (at 3-4), contends, without a single supporting Appendix citation, that, from the inception and according to the lease terms, "[e]xecution of the ground lease was conditioned upon CIR's securing firm financing for the construction and development of the

proposed project" (Opposition Brief at 4).

However, CIR's Petition, with Appendix citation to the relevant Ground Lease provisions, unequivocally documents that financing was initially a post-leasing, pre-construction requirement rather than a condition to the entering of the Ground Lease itself. (App. 33a-35a; See App. 34a-35a at § 13.04(d)(ii)). Only the first and second extension agreements made financing a pre-leasing condition, a condition dropped from extension agreements three, four and five, five being the final and operative extension agreement. (App. 36a-49a).

As demonstrated in CIR's Petition, CIR's principal contends that the removal of the pre-leasing financing condition from the later extension agreements, and the resulting reversion to the post-leasing pre-construction financing condition as expressly set forth in the Ground Lease was intended by the parties, as an unsigned Ground Lease was simply not financeable, a contention in which the City had heretofore apparently concurred. (App. 67a-68a at ¶¶ 119-22; See App. 58a at ¶ 11)

Notwithstanding the lack of a pre-leasing financing condition in the last three extension agreements, the City's Brief in Opposition (at 4) states that the City "took the position that CIR's unilateral execution and delivery of the draft lease had no legal force and effect because the execution of a final lease by the parties was conditioned upon CIR's procuring firm financing in a form and amount satisfactory to the City". The City's Brief in Opposition, however, presents no Appendix citation to lend support to the City's unilaterally asserted "position".

How a financing condition unquestionably absent from

the last three extension agreements could have nevertheless lingered, as a matter of fact and law, as a contract-killing specter hovering over the $400 million redevelopment project, is the principal factual and legal point that the City was required to conclusively prove beyond any material factual or legal dispute in order to be entitled to summary judgment below.

C. Other Important Factual Disputes Exist Relating to CIR's Non-contractual Equal Protection Claim

The City's Brief in Opposition (at 7), contends, once again without a single reference to the Appendix, that subsequent to CIR's institution of a never adjudicated Article 78 Proceeding[1] the City and CIR engaged in off-handed discussions concerning continuing CIR's project, simply to give an "audience" to CIR "as an adjacent property owner to the stadium project".

However, as stated in CIR's Petition, CIR contends that substantive and protracted negotiations were held between the City's Economic Development Corporation ("EDC") and CIR and its highly respected proposed strategic partners, in an effort to harmonize CIR's project with construction of the stadium. CIR further contends that, shortly before the instant

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[1] The City's Brief in Opposition (at 6), seeks support from the decision in the never adjudicated Article 78 Proceeding denying CIR a preliminary injunction. However, the denial of preliminary injunctive relief is not afforded *res judicata* or *collateral estoppel* effect. E.g., *Irish Lesbian and Gay Organization v. Giuliani*, 143 F.3d 638, 644-45 (2nd Cir. [illegible] *Corp. v. Fabrication Enterprises, Inc.*, 68 N.Y. [illegible] N.E.2d 197, 199 (1986).

litigation, the mayor removed the project from the EDC and threatened one of CIR's strategic partners with loss of other City projects if its association with CIR continued.

Though the City's Brief in Opposition places a different and disputed "spin" upon the nature of the ongoing negotiations, it does not refute the removal of the project from the EDC nor the threatening of CIR's strategic partner, events that, apart from the contract to enter the Ground Lease, support CIR's Equal Protection claim.

D. By Ignoring State Contract Law and Depriving CIR of its Jury Trial Right, the District Court and the Court of Appeals Simply Adopted Those of the Competing Factual Contentions Found by Those Courts to Be More Appealing

If the briefs of the parties upon this petition for certiorari establish anything at all, they establish that there are drastically different and competing material factual contentions, not resolvable without a trial.

As amply demonstrated in CIR's Petition, parol evidence is inadmissable under state law to vary the parties' unambiguous contract to enter the Ground Lease. Further, as demonstrated in CIR's Petition (at 22-23), resort to parol evidence, where such resort permissible, would, in and of itself, preclude summary judgment and mandate a trial.

However, in awarding summary judgment to the City, not only did the courts below disregard state law in their resort to parol evidence and in their creation of an implied contractual condition, but further, precluded pre-trial discovery and usurped the function of the trier of fact, by

judicially selecting the City's disputed factual contentions as being more appealing. Only in this fashion did the courts below create an implied condition precedent indisputably absent from the face of the parties' contract.

II. The *Erie* Doctrine, When Applicable, Mandates Fealty to, Not Merely Lip Service to State Law as the Rule of Decision

The City's Brief (at 14-16), contending that sufficient grounds for the granting of a writ of certiorari have not been asserted, repeats its aforementioned disingenuous argument that the draft Ground Lease was materially incomplete. The City's Brief thus implies that the District Court and Court of Appeals decisions were motivated by, if not founded upon this contention, and that CIR's Petition raises nothing more than a disagreement with those courts' appropriately made findings of fact.

In truth, as a reading of the decisions of those courts clearly establishes, both courts implicitly accepted as a given that the contract to enter the lease was valid and binding upon the parties, and that the Ground Lease signed by CIR was complete in all material respects. Both courts held, however, that, based solely upon parol evidence, the final extension agreement was deemed to contain an implied-in-fact pre-leasing financing condition, notwithstanding that condition's absence from the agreement's express terms.

Therefore, CIR's Petition is not at all predicated upon a respectful disagreement with a properly reached factual determination of the courts below. To the contrary, CIR's Petition is addressed to the process utilized by those courts in adding an implied contractual condition precedent, a process which contravenes state law rules governing the resort to parol

evidence, thereby disregarding the constraints imposed upon the federal judiciary by the *Erie* doctrine.

Indeed, as noted in the City's Brief in Opposition, the Court of Appeals does make reference to the New York State parol evidence rule, but, as demonstrated in CIR's Petition, in purporting to apply that rule, the Court of Appeals utterly disregards the state law fundamentals governing implementation of that rule.

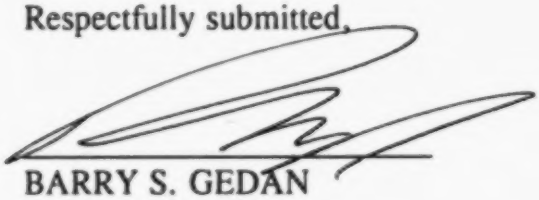
As noted in CIR's Petition, the Court of Appeals failed to apply, or even to consider the state law burden of proof for imposing an implied-in-fact covenant (a "heavy burden"), failed to follow the state law conditions precedent for resorting to parol evidence (the contract must appear incomplete on its face and the parol evidence may not contradict the contract terms), and, most distressingly, ignored the state law proscription depriving New York courts of the power to judicially add contract conditions by "interpretation" or "construction", absent contractual ambiguity. The disregarding of that state law limitation upon the interpretative power of its courts in contract cases was compounded by the contravention of the well-established rule that resort to parol evidence in and of itself precludes an award of summary judgment. Thus, CIR's Petition is addressed to the Court of Appeals having substituted an amorphous and impermissible federal common law of contracts for the rule of decision mandated by the law of the state.

Respectfully, for federalism to continue to flourish, the *Erie* doctrine demands not mere lip service to be paid to state law by its mention, as was the case in the courts below, but rather, that full fealty be accorded to state law as providing the rule of decision.

CONCLUSION

CIR's Petition raises substantial issues of federalism of nationwide import, and of particular import in the realm of commercial transactions, and thus worthy of this Supreme Court's attention.

Respectfully submitted,



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